53D GRADUATE COURSE

PRETRIAL PROCEDURES

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PRETRIAL PROCEDURES

Outline of Instruction

I. ARTICLE 32 INVESTIGATIONS.

A. Art. 32, UCMJ: "No charge or specification may be referred to a general court martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made."

B. Purposes of the art. 32 investigation.

1. Statutory Purposes. Art. 32, UCMJ; RCM 405(a) discussion; and RCM 405(e).

a. Inquire into the truth of the matter alleged in the charges.

b. Consider the form of the charges.

c. Make recommendations as to disposition of the charges.

2. Discovery as a purpose. The investigation also serves as a means of discovery. RCM 405(a) discussion; *United States v. Roberts*, 10 M.J. 308 (C.M.A. 1981); *and* art. 32(b), UCMJ.

3. Preservation of testimony.

a. Art. 32 testimony may be admissible at trial as a prior statement under M.R.E. 801(d)(1) (*substantive evidence*). Use caution: *United States v. Austin*, 35 M.J. 271 (C.M.A. 1992). Child victim testified in detail at the art. 32 but recanted her testimony at trial. Over defense objection, trial court admitted 15-page transcript of art. 32 testimony as prior inconsistent statement pursuant to M.R.E. 801(d)(1)(A) and as former testimony under M.R.E. 804(b)(1). The transcript was read to the panel *and* then given to the panel to take into the deliberation room. Held: reversible error to send transcript back to deliberation room with panel. The transcript was not an exhibit under R.C.M. 921.

b. *United States v. Ureta*, 44 M.J. 290 (1996), *cert. denied*, 117 S.Ct. 692 (1997). Art. 32 transcript admissible as prior inconsistent statement and substantive evidence on issue of guilt in case of rape and carnal knowledge of 13-year-old daughter. Accused's wife testified at art. 32 that accused confessed. After art. 32 terminated, wife refused to discuss her testimony with Gov't. Unsure whether wife would recant art. 32 testimony at trial, Gov't called wife as witness, she recanted, acknowledged inconsistency, and over defense objection, art. 32 transcript was admitted and taken into deliberation. CAAF held that art. 32 transcript was not admissible under M.R.E. 608(b) (no extrinsic evidence of prior inconsistent statement when witness available and testifies, admits making prior statement, and acknowledges specific inconsistencies), but Art. 32 transcript admissible under M.R.E. 801(d)(1)(A) as substantive evidence and Gov't can call witness to establish foundation for admission. *Error to send transcript into deliberations, but harmless because unlike Austin, art 32 transcript was not the only evidence against accused*.

c. Art. 32 testimony may be admissible at trial as former testimony under Mil. R. Evid. 804(b)(1). *See Austin* (above) *and United States v. Connor*, 27 M.J. 378 (C.M.A. 1989) ("If the defense counsel has been allowed to cross-examine the government witness without restriction on the scope of cross-examination, then the provisions of M.R.E. 804(b)(1) and of the 6th Amendment are satisfied, even if that opportunity is not used, and the testimony can later be admitted at trial."). *See also United States v. Ortiz*, 35 M.J. 391 (C.M.A. 1992) (government must establish that the witness was unavailable before former testimony may be properly

admitted). *United States v. Hubbard*, 28 M.J. 27 (C.M.A. 1989) (When art. 32 testimony is offered at trial, the proponent must establish the unavailability of the witness per M.R.E. 804(b)(1) and the 6th Amendment). The Government proves unavailability through serving a subpoena, and in the last resort, a warrant of attachment on the witness.

d. Art. 32 testimony may be admissible at trial as residual hearsay for unavailable declarants under M.R.E. 804(b)(5). *United States v. Cabral*, 47 M.J. 808 (1997). Five year old victim of sexual abuse appeared for trial but refused to testify. Witness declared "functionally unavailable" and Art. 32 videotaped testimony, which had "particularized guarantees of trustworthiness" (language suitable for 5 year old, described acts not common to experience of 5 year old, use of non-leading questions, no motive to fabricate) was admissible under M.R.E. 804(b)(5).

4. Art. 32 is required, except:

a. When there has been an adequate substitute. RCM 405(b). If there has already been an investigation into the subject matter of the charges and the accused was present at that investigation, had the right to be represented by counsel, and to present evidence, that investigation may satisfy the requisites of Art. 32. *United States v. Diaz*, No. 00-0903, (N-M Ct. Crim. App. Sept. 1, 2000). After the Article 32, the accused identified a defect in the preferral of the initial charges, which were dismissed, and new charges preferred. The accused requested a new Article 32, contending that the preferral defect meant that no charges had been investigated by the first Article 32. The Navy Court held the first Article 32 was valid and satisfied the requirements of Article 32.

b. When the accused waives the Art. 32. RCM 705(c)(2)(E) and RCM 905(e).

(1) RCM 905(e); RCM 705(c)(2)(E); *United States v. Shaffer*, 12 M.J. 425 (C.M.A. 1982). Art. 32 is not a jurisdictional requirement. RCM 905(b)(1) Discussion.

(2) *United States v. Garcia*, 59 M.J. 447 (2004). Accused must personally waive right to Article 32 hearing (attorney cannot waive it for him).

(3) May be waived as a condition of a pretrial agreement.

(4) May be waived for personal reasons. If waived for personal reasons, withdrawal of the waiver need only be permitted upon a showing of good cause. *United States v. Stone*, 37 M.J. 558 (A.C.M.R. 1993) (Accused's oral agreement and then written waiver of the Art. 32 was not part of the pretrial agreement and when the "deal" fell through, the government was not required to accept accused's revocation of his waiver of the Art. 32.) *See also United States v. Nickerson*, 27 M.J. 30 (C.M.A. 1988) (Accused's withdrawal of guilty plea was not good cause for relief from waiver of art. 32 investigation where guilty plea and waiver were not mutually dependent).

(5) Defense offer to waive is not binding on the government; investigation may still be held. RCM 405(a) Discussion.

5. Scope of the investigation.

a. Investigation should be limited to issues raised by the charges and necessary to proper disposition of the case. RCM 405(e) Discussion.

b. Investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers.

c. What if the investigation discloses new offenses?

(1) Art. 32(d): IO may investigate subject matter of that offense without preferral of new/additional charge(s). RCM 405(e).

(2) Possible courses of action:

(a) IO consults legal adviser, delays Art 32; new charges preferred; IO then reconvenes hearing to investigate all charges.

(b) IO could prefer the new charges after the hearing. RCM 405(d)(1). IO is disqualified to act later in the same case in any capacity. *But see United States v. Beckerman*, 35 M.J. 842 (C.G.C.M.R. 1992) (Article 32 IO could subsequently prefer a new charge against the accused), *set aside on other grounds*, 44 M.J. 273 (1996); *adhered to*, 48 M.J. 698 (Coast Guard Ct. Crim. App. 1997).

(c) IO consults legal adviser, notifies accused of general nature of new offenses which she intends to investigate, and begins calling witnesses, allowing accused the same rights of representation, examination, and presentation of evidence concerning the new charges. *See* Article 32(d); RCM 405(e) Discussion.

d. If charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matter. *See, e.g., United States v. Bender*, 32 M.J. 1002 (N.M.C.M.R. 1991).

e. May include inquiry into legality of searches or the admissibility of a confession. RCM 405(e) Discussion.

f. IO should note objections but is not required to rule on them.

C. Appointing Authority. RCM 405(c).

1. Any court-martial convening authority (including summary court-martial convening authority) may direct an Article 32 investigation.

2. Usually, the special court-martial convening authority (SPCMCA) will order the investigation.

3. The appointing authority should be reasonably neutral and detached. She does not need to be absolutely neutral.

a. *United States v. Wojciechowski*, 19 M.J. 577 (N.M.C.M.R. 1984). Appointing Authority told a NIS agent and the accused's DC, prior to completion of the Art. 32, that he was "going to send (appellant) to a general court-martial."

b. Accuser disqualification.

(1) *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997). SPCMCA who was accuser [preferred charges therefore *statutorily disqualified*] had only official interest in case and was not disqualified from appointing IO.

(2) *United States v. Dinges*, 49 M.J. 232 (1998). "An accuser [other than official interest therefore *personally disqualified*] under Article 1(9) . . . may not order charges investigated under Article 32 . . . and may not recommend a general court-martial [when forwarding the charges to the GCMCA]." Following a *DuBay* hearing where SPCMCA testified, the CAAF held SPCMCA was not an accuser under the facts of this case (55 M.J. 308 (2001)).

D. Investigating officer. RCM 405(d)(1).

1. Must be a commissioned officer. Cannot be a commissioned warrant officer. AR 27-10, para. 7-7d.

2. Preference for field grade officers or officers with legal training. RCM 405(d)(1) Discussion.

3. Controls the proceedings. It was not error for the IO to limit redundant, repetitive, or irrelevant questions by the defense counsel. *United States v. Lewis*, 33 M.J. 758 (A.C.M.R. 1991).

4. RCM 405(d)(1). IO is disqualified to act later in the same case in any capacity. *But see United States v. Beckerman*, 35 M.J. 842 (C.G.C.M.R. 1992) (Article 1(9), UCMJ, Article 32, and RCM 405(d)(1) do not preclude an IO who has investigated the charge against an accused from subsequently preferring a new or an additional charge against the accused).

5. Article 32 IO serves in a judicial capacity. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977).

a. Ex parte contacts by the IO regarding substantive matters constitute error which will be tested for prejudice. Ex parte contacts have a presumption of prejudice that may be rebutted by the trial counsel, but actual prejudice to accused is very difficult to prove. *United States v. Payne*, 3 M.J. 354 (C.M.A. 1977) (seven meetings with trial counsel); *United States v. Whitt*, 21 M.J. 658 (A.C.M.R. 1985) (two "informal" ex parte interviews with three witnesses); *United States v. Francis*, 25 M.J. 614 (C.G.C.M.R. 1987) (meeting with CO, trial counsel, and accuser); and *United States v. Rushatz*, 30 M.J. 532 (A.C.M.R), *aff'd*, 31 M.J. 450 (C.M.A. 1990) (contacting CID, visiting housing & finance offices, talking with potential witness).

b. *United States v. Argo*, 46 M.J. 454 (1997). Staff Judge Advocate's request to Art. 32(b) IO (a subordinate officer not under his supervision) to: reopen investigation to look into issue of unlawful command influence; and reject the defense's interpretation of precedent regarding "no-contact" order did not constitute unlawful command influence. Accused suffered no prejudice by a full investigation of the unlawful command influence issues. Although SJA's ex parte contact violated the law, there was no prejudicial impact because the IO consulted her own SJA for legal advice and exercised independent judgment; and the defense did not enter an objection at any stage of the court-martial process.

6. *United States v. Holt*, 52 M.J. 173 (1999). Art. 32 IO recommended accused's case be referred capital for his alleged murder of a fellow-biker. After referral, the Article 32 officer attended a forensic evidence course and, upon returning to the command, gave trial counsel the name and phone number of a forensic expert. Ultimately, this expert testified for the government that the spatter patterns on jeans seized from the accused were consistent with a stabbing. The CAAF noted that an "investigating officer is disqualified" from acting subsequently "in the same case in any other capacity" under RCM 405(d)(1), and that his provision of information solely to the assigned prosecutor may have created at least the appearance of impropriety by providing trial counsel with information that was neither transmitted to the commander who ordered the investigation nor served on the accused. Nevertheless, the court found that the military judge committed no prejudicial error; the decision to submit the jeans for testing and to call the expert witnesses were solely the decisions of the prosecution.

E. Witness and evidence production.

1. General Rule (RCM 405(g): Any witness whose testimony would be relevant to the investigation and not cumulative shall be produced if the witness is "reasonably available." This includes witnesses for the accused upon a timely request.

a. Determination of "Reasonable Availability." RCM 405(g)(1)(A).

(1) *Availability within 100 miles of situs.* "A witness is reasonably available when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of obtaining the witness' appearance." The IO makes the determination whether reasonably available. *Note, despite the "100 mile" language in RCM 405(g)(1)(A), the witness' immediate commander may veto an art. 32 IO's determination per RCM 405(g)(2)(A).

(2) Interpretation of 100-Mile Test. *United States v. Marrie*, 43 M.J. 35 (1995). A witness located more than 100 miles away from the situs of an art. 32 investigation ***is not per se unavailable***. IO's determination that three child sexual abuse victims were not reasonably available based on the 100-mile rule was error (although harmless) in light of IO's failures to apply the balancing test and obtain testimony through alternative form (e.g., telephone, written sworn statement). The determination of reasonable availability for witnesses located more than 100 miles from the situs of the investigation is left to the discretion of the commander. The Court effectively dissolved Change 5 to the MCM (established 100-Mile test). *See* Discussion, RCM 405(g)(1)(A) and RCM 405(g)(2)(A).

b. *United States v. Burfitt*, 43 M.J. 815 (A.F. Ct. Crim. App. 1996). Not every ruling of unavailability premised on wooden application of 100-mile rule is fatal. IO's error in applying the 100-mile rule ***must cause some prejudice*** to accused. It was harmless error for the IO to apply 100-mile test without determining if importance of testimony outweighed the difficulty, delay, and expense of securing physical presence because IO obtained evidence via telephone and MJ allowed accused further opportunity to interview witnesses. *Record should support IO's determination of availability when victim does not appear for art. 32 investigation. IO's determination must be carefully considered, clearly articulated, and amply supported in the record.*

c. *United States v. Willis*, 43 M.J. 889 (A.F. Ct. Crim. App. 1996), *aff'd*, 46 M.J. 258 (1997). IO's misapplication of 100-mile rule, amongst other things, did not substantiate claims of IO bias.

2. Determining availability of witnesses.

a. Military witnesses.

(1) Investigating officer makes an initial determination whether a witness is reasonably available.

(2) Immediate commander of the witness has the discretion and may exercise a "veto" and determine that the witness is not reasonably available.

(3) Unavailability determination is not subject to appeal, but may be reviewed at trial.

b. Civilian witnesses.

(1) IO makes initial determination.

(2) Final decision is within the discretion of the commander who ordered the investigation. Payment of transportation and per diem to civilian witnesses must be approved by the GCMCA. Para. 5-12, AR 27-10.

(3) Cannot be subpoenaed to appear at an art. 32 hearing. *Cf. United States v. Johnson*, 53 M.J. 459 (2000). Accused was convicted, primarily through testimony of his wife, of assaults on his eight month-old daughter. His wife testified against him at the Article 32 hearing, and later at trial. She appeared at the Article 32, UCMJ, hearing pursuant to a German subpoena, which threatened criminal penalties if she did not comply. The military judge found that the subpoena was unlawful and issued without apparent legal authority, but found that the accused was not prejudiced by having a witness illegally produced at the hearing. The CAAF agreed with the military judge that the subpoena was unlawful, and that the accused suffered no prejudice to his substantial rights as a result of the improper production of the witness. The CAAF concluded that the accused did not have standing to object to the use of the Article 32 testimony at trial because the evidence presented against him was reliable.

(4) Can be compelled by subpoena to testify at a deposition. RCM 702.

(5) Can be ordered to testify as an incident of employment if employed by the United States government and the art. 32 investigation concerns matters which are related to the civilian's job. *Weston v. Dept. of Housing & Urban Development*, 724 F.2d 943 (Fed. Cir. 1983).

c. Immunized witnesses. Only a GCMCA has the authority to grant immunity to witnesses to testify at an Art. 32 Investigation or court-martial. RCM 704(c) and Discussion. *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991) (no abuse of discretion in denying defense requested immunity for two witnesses at art. 32).

F. Alternatives to testimony and evidence. RCM 405(g)(4) and (5). DC may be considered the "gatekeeper" of the admissibility of evidence at the Art. 32 hearing, because admissibility generally hinges on whether DC makes an objection.

1. Testimony.

a. If no defense objection, all relevant testimony (and substitutes for testimony) will be received, regardless of availability of the witness.

b. The following evidence may be admitted over defense objection, provided the witness is *not* reasonably available:

(1) Sworn statements. Witnesses who invoke their right to self-incrimination at the Art. 32 are "not reasonably available" within the meaning of RCM 405(g)(1)(a); *United States v. Douglas*, 32 M.J. 694 (A.F.C.M.R. 1991). *See also*, RCM 405(g)(1)(A) and M.R.E. 804(a)(1).

(2) Statements under oath taken by telephone, radio, etc.

(3) Prior testimony under oath.

(4) Depositions; and,

(5) In time of war, unsworn statements.

2. Evidence. Absent a defense objection, virtually all forms of evidence may be admitted, regardless of the availability of the evidence. If there is a defense objection, and the evidence is reasonably unavailable, the following may be considered:

a. Testimony describing the evidence.

b. An authenticated copy, photograph, or reproduction.

c. Stipulation of fact, document's contents, or expected testimony.

G. Procedure for conducting the investigation.

1. General Procedure.

a. CA is authorized to prescribe specific procedures for conducting the investigation. RCM 405(c). Normally, DA Pam 27-17 (Sep 90) will be followed.

b. The CA will usually require expeditious proceeding and set the deadline for receipt of the record of investigation. Per RCM 707(c) and Discussion, have appointing authority delegate authority to approve pretrial delay to Article 32 IO. *See United States v. Thompson*, 46 M.J. 472 (1997), *affirming* 44 M.J. 598 (N.M. Ct. Crim. App. 1996). Defense requested delays that were granted by the Article 32 investigating officer and later ratified by the convening authority after the fact were properly excluded from the speedy trial calculations under RCM 707. The court leaves for another day the issue of whether the Article 32 Investigating Officer (IO) has inherent, independent power to exclude a delay from speedy trial consideration.

c. IO has broad discretion regarding sequence of events and other details.

2. Military Rules of Evidence. RCM 405(i). Military Rules of Evidence do *not* apply other than Mil. R. Evid. 301 (self incrimination), 302 (statements from mental examination), 303 (degrading), 305 (rights warning), 412 (rape shield) and Section V (privileges).

3. Open versus closed hearing.

a. Ordinarily, the proceedings should be open, but may be restricted or closed in the discretion of the appointing authority or the investigating officer. Qualified First and Sixth Amendment rights to open hearings.

b. Absent cause shown that outweighs the value of openness (overriding interest articulated in the findings), the military accused is entitled to a public Article 32 hearing. The right is ***not*** absolute.

c. *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997) (SPCMCA erred in directing closure of hearing).

d. The press enjoys the same right to a public Article 32 and has standing to complain if access is denied.

(1) *San Antonio Express-News v. Morrow*, 44 M.J. 706 (A.F. Ct. Crim. App. 1996) (cited with approval in *ABC, Inc. v. Powell*). Court denied newspaper's extraordinary writ to reverse by mandamus IO's decision to close hearing, over defense objection, concerning 04 charged with murder of 11-year old girl. While Art 32 investigations are presumptively public hearings, the IO did not abuse discretion, and articulated good reasons supporting her action (citing a need to protect against the dissemination of information that might not be admissible in court; to prevent against contamination of a potential jury pool; to maintain a dignified, orderly, and thorough hearing; and to encourage the complete candor of witnesses called to testify). The court reasoned that RCM 405(h)(3) is unclear how competing interests are to be weighed in deciding whether to close a hearing, or whether the entire hearing could be closed, so mandamus was not appropriate for this area of law that is "developing" and "subject to differing interpretations."

e. Analogy: Standard at trial. *See United States v. Anderson*, 46 M.J. 728 (Army Ct. Crim. App. 1997) (adopting the "stringent test" for closure of court-martial proceedings (*citing Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 520 (1984)).

(1) ***The standard for courts-martial.*** *See ABC, Inc, v. Powell*, 47 M.J. 363 (1997). SPCMCA's reasons (maintain integrity of military justice system, prevent dissemination of evidence that might not be admissible at trial, and shield alleged victims from possible news reports about anticipated attempts to delve into each woman's sexual history) supporting decision to close *entire* investigation were unsubstantiated. ***A servicemenber has a qualified right to an open article 32 investigation.***

(2) Closure determination must be made on a "case-by-case, witness-by-witness, and circumstance-by-circumstance basis whether closure in a case in necessary to protect the welfare of a victim.

II. THE ARTICLE 34 PRETRIAL ADVICE.

A. Introduction.

1. UCMJ art. 34: "The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate. . . ."

2. Description: The Pretrial Advice is a formal document containing the SJA's independent advice regarding the disposition of the charges.

3. Required under Article 34, UCMJ, as a prerequisite to trial by General Court-Martial.

4. Not required for trial by Special (SPCM) or Summary Court-Martial. RCM 406(a) Discussion. *But see* AR 27-10, *Military Justice*, para. 5-27 (b) (stating SJA will prepare a pretrial advice for SPCM involving confinement in excess of 6 months, forfeiture of pay for more than six months, or a BCD). *Proposed changed to AR 27-10, para. 5-27(c) recommends removing pretrial advice requirement from SPCM*.

5. No civilian equivalent.

B. Purposes of the advice.

1. Substantial pretrial right of the accused.

2. Protects accused against trial on baseless charges.

a. Protects accused against referral to an inappropriate level of court-martial.

b. Prosecutorial Tool - provides legal advice to the CA regarding the charges.

C. Mandatory contents (Short Form). Art. 34, UCMJ.

1. Conclusions with respect to whether each specification alleges an offense under the code;

2. Conclusions with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation; the standard is probable cause. RCM 406(b) Discussion.

3. Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

4. SJA Recommendation of the action to be taken by the convening authority (nonbinding). (SJA need not set forth the underlying analysis or rationale for the conclusions. RCM 406(b) Discussion.).

D. Optional contents (Long Form). R.C.M 406(b) Discussion.

1. Personal data concerning the accused.

2. Summary of charges.

3. Summary of evidence.

4. Summary of extenuation and mitigation.

5. Subordinate commander's recommendations.

6. Failure to include optional information is not error. RCM 406(b) Discussion.

a. Whatever matters are included in the advice should be accurate. RCM 406(b) Discussion. *United States v. Foley*, 37 M.J. 822 (A.F.C.M.R. 1993). SJA's advice inaccurately reported that unit commander recommended referral to GCM. Court found that error was harmless in light of accused's light sentence. *See also United States v. Murray*, 25 M.J. 445 (C.M.A. 1988). Pretrial advice omitted a charge. Procedural error tested for prejudice.

b. Reference to race is inappropriate for inclusion in court-martial records, including the pretrial advice. *United States v. Brice*, 33 M.J. 176 (C.M.A. 1991) (summary disposition); reference to accused's "Racial/ethnic identifier." *See also United States v. Holt* and *United States v. Phillips*, both at 27 M.J. 402 (C.M.A. 1988) (summary dispositions).

E. Short form vs. Long form.

1. Short form: Easier preparation.

2. Short form: Less likely to be inaccurate – minimal proofreading required.

3. Long form: SJA does not personally brief CA.

4. Long form: CA prefers - and gets - more detailed information.

a. May include victim comments per AR 27-10, para 18-14.

b. Capital Cases. Use Pretrial Advice to give notice of aggravating factors prior to arraignment per RCM 1004(b)(1) and (c).

F. Preparation and contents.

1. SJA need not personally prepare the advice but is personally responsible for it. SJA must personally sign the pretrial advice. It may not be signed "For the SJA." *United States v. Hayes*, 24 M.J. 786 (A.C.M.R. 1987).

a. The trial counsel may *draft* the pretrial advice for the SJA's consideration. *See United States v. Smith*, 33 M.J. 527 (A.F.C.M.R. 1991), *aff'd*, 35 M.J. 138 (C.M.A. 1992).

b. Inappropriate comments by the SJA in the pretrial advice may disqualify the SJA from preparing the SJA Post-trial Recommendation. *United States v. Plumb*, 47 M.J. 771 (A.F. Ct. Crim. App. 1997). In the pretrial advice, the SJA referred to the accused, an Air Force OSI CPT, as a "shark in the waters, [who] goes after the weak and leaves the strong alone." The Air Force court said that such a comment was "so contrary to the integrity and fairness of the military justice system that it has no place in a pretrial advice." The comment (in conjunction with other errors) resulted in the findings and sentence being set aside.

2. Dispute over Advice may disqualify SJA from preparing Post-Trial Recommendation.

a. Mere preparation of the pretrial advice is not enough to disqualify the SJA. However, under RCM 1106(b), the SJA may be disqualified from preparing the post-trial recommendation when the sufficiency or correctness of the earlier action (the pretrial advice) is placed in issue.

b. *See United States v. Lynch*, 39 M.J. 223 (C.M.A. 1994). Accused questioned the pretrial advice in a motion prior to trial. "[W]here a legitimate factual controversy exists between the SJA and DC, the SJA must disqualify himself from participating in the post-trial recommendation."

3. SJA must make an independent and informed appraisal of the charges;

4. Enclosures with the Pretrial Advice.

a. Charge sheet.

b. Forwarding letters and endorsements.

c. Report of (Article 32) investigation, DD Form 457.

G. Defects in the pretrial advice.

1. Objections are waived if not raised prior to entry of pleas or if the accused pleads guilty. RCM 905(b) and (e); *see generally* RCM 910(j); *see also United States v. Packer*, 8 M.J. 785 (N.C.M.R. 1980); *United States v. Blakney*, 2 M.J. 1135 (C.G.C.M.R. 1976); *United States v. Henry*, 50 C.M.R. 685 (A.F.C.M.R. 1975).

a. Defects are not jurisdictional and are raised by a motion for appropriate relief. RCM 906(b)(1); RCM 406 Discussion.

b. Omission of a charged offense from the Advice may allow the inference that the CA did not see it, was not briefed on it, and that he did not intend to send it forward to trial. *Cf. United States v. Moore*, 36 M.J. 795 (A.C.M.R. 1993): Accused charged with AWOL, larceny, housebreaking, and wrongfully making a military ID card. At trial, military judge consolidated specifications into one specification of larceny by false pretenses (wrongful appropriation of $850.00 from Merchants National Bank; ten specifications of forgery of checks from the account of a Calvin A. Moore with Merchants National Bank; and three specifications of fraudulently writing checks on the account of Calvin A. Moore with Merchants National Bank knowing that the account had insufficient funds for payment). Court was without jurisdiction to try the offense: There was no express or constructive indication that the convening authority had referred the larceny charge to trial; no evidence that CA ordered the consolidated larceny charge be tried by the court-martial; new charge not mentioned in pretrial agreement.

2. Testing for error.

a. Information which is so incomplete as to be misleading may result in a defective advice, necessitating appropriate relief. RCM 406(b) discussion; *see* RCM 905(b)(1) and 906(b)(3).

b. Is the advice so "incomplete, ill-considered, or misleading" as to a material matter that the convening authority might have made an erroneous referral? *United States v. Kemp*, 7 M.J. 760 (A.C.M.R. 1979).

H. Failure to Provide Pretrial Advice.

1. Failure to provide a written pretrial advice to the convening authority is error which will be tested for prejudice. *United States v. Murray*, 25 M.J. 445 (C.M.A. 1988).

2. *United States v. Green*, 44 M.J. 631 (1996). Accused failed to raise absence of written pretrial advice at trial for wrongful appropriation of motor vehicle, larceny, and obtaining services by false pretenses. Waiver rule applied.

III. PLEAS.

A. RCM 910 governs entry of pleas.

1. RCM 910(a)(1) permits pleas to lesser included offenses to be made without pleading by exceptions and substitutions.

2. Effect of Guilty Plea. RCM 910(j). General rule: Guilty plea waives any objection, whether or not previously raised, if the objection relates to the factual issue of guilt.

3. Not waived:

a. Multiplicity (only not waived if charges are "facially duplicative").

b. Jurisdictional issues

c. Ineffectiveness of counsel

d. Unlawful command influence (adjudicative, not accusatory)

e. Selective prosecution

(1) *United States v. Lloyd*, 46 M.J. 19 (1997) (waiver of multiplicity issues that are not facially duplicative). *United States v. McMillian*, 33 M.J. 257 (C.M.A. 1991) (multiplicious charges made during sentencing not waived by guilty plea to the charges); *United States v. Johnston*, 39 M.J. 242 (C.M.A. 1994). Although accused did not raise unlawful command influence issue at trial, UCI is not waived by guilty plea. *United States v. Henry*, 42 M.J. 231 (1995). Where facts necessary to make claim not fully developed, accused did not waive his claim of racially-based selective prosecution. Many alleged co-conspirators had yet to be tried.

4. Waived:

a. Suppression issues (confession, other evidence);

b. Speedy Trial (per RCM 707(e)); CAAF has not yet ruled if Article 10 issues are waived by failure to raise at trial. *See United States v. Birge*, 52 M.J. 209 (1999). *But see United States v. Mizgala*, No. 34822, 2004 CCA LEXIS 24 (A.F. Ct. Crim. App., Jan. 23, 2004) (unpub.), *pet. granted*, 2004 CAAF LEXIS 562 (C.A.A.F., June 25, 2004). AFCCA ruled the accused, by entering an unconditional plea of guilty, waived his right to appellate review of his speedy trial claim under Article 10, UCMJ. The CAAF has granted review to determine if an accused does waive his right to a speedy trial under Article 10, UCMJ by entering an unconditional guilty plea.

c. Factual issues (related to the offense).

5. Conditional Guilty Plea. RCM 910(a)(2).

a. "With the approval of the military judge and the consent of the Government [only the General Court-Martial Convening Authority (GCMCA) may consent for the government, para. 5-23(b), AR 27-10], an accused may enter a conditional plea of guilty, reserving in writing the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails (on appeal). . . , the accused shall be allowed to withdraw the plea of guilty." Case law (primarily from the Air Force courts) requires that the motion or issue in question be case-dispositive.

b. ***But see* proposed change to AR 27-10, para. 5-25(b).** Deletes GCMCA authority to enter into conditional guilty pleas and requires approval from the Chief, Criminal Law Division after coordination with the Assistant Judge Advocate General for Military Law and Operations.

c. *United States v. Vaughan*, 58 M.J. 29 (2003). Appellant entered conditional plea to "child neglect" charge under Article 134, UCMJ "preserving the issue of whether the charge states an offense." Under R.C.M. 907(b)(1)(B), this issue is never waived; however, appellate courts view the issue differently if it is raised for the first time on appeal. *See United States v. Watkins*, 21 M.J. 208, 209 (C.M.A. 1986) (holding that specifications challenged for the first time on appeal are "liberally construe[d] in favor of validity").

d. *United States v. Mapes*, 59 M.J. 60 (2003). Appellant convicted of involuntary manslaughter and various other offenses arising from his injection of a fellow soldier with a fatal dose of heroin. Appellant entered into a pretrial agreement that permitted him to enter a conditional plea pursuant to R.C.M. 910(a)(2) that preserved his "right to appeal all adverse determinations resulting from pretrial motions." At trial, appellant moved to dismiss all charges due to improper use of immunized testimony and evidence derived from that immunized testimony in violation of *Kastigar v. United States*, 406 U.S. 441 (1972). Although the CAAF dismissed most of the charges and specifications due to the *Kastigar* violation, appellant was permitted to withdraw his plea to those remaining offenses which were not directly tainted by that violation, as the violation caused or played a substantial role in the GCM referral of those offenses. In so doing, the CAAF noted that although military practice, unlike its federal civilian

counterpart, does not limit conditional pleas to issues that are dispositive, "the Analysis of the Military Rules of Evidence advises cautious use of the conditional plea when the decision on appeal will not dispose of the case . . . Where a conditional guilty plea is not case dispositive as to either the issue preserved for appeal or as to all of the charges in a case, the military judge should address as part of the providence inquiry the understanding of the accused and the parties as to the result of the accused prevailing on appeal." Although the military judge initiated a discussion with the accused concerning this matter, it was inadequate.

e. *United States v. Shelton*, 59 M.J. 727 (Army Ct. Crim. App. 2004). Pretrial agreement preserved for appellate review "any adverse determinations made by the military judge of any of the pretrial motions made at [the accused's] court-martial." Defense made a motion to suppress based on the clergy privilege, and also made a discovery motion for the CID Agent Activity Summaries (commonly known as "28's"). "Based on the lack of emphasis given to the discovery motion at the trial level, the convening authority and stag judge advocate, and the parties at trial, may not all have been aware that appellant's conditional guilty plea preserved the discovery motion." Additionally, the military judge mentioned that only the clergy privilege motion was preserved by the plea. Citing *Mapes*, the court found that "the military judge failed to thoroughly address the parameters of the conditional guilty plea's impact." Accordingly, both motions were preserved for appeal.

f. *United States v. Proctor*, 58 M.J. 792 (A.F. Ct. Crim. App. 2003). Appellant spent 107 days in pretrial confinement prior to preferral of charges, and a total of 161 days prior to arraignment. Appellant entered a conditional plea of guilty, preserving the speedy trial issues for appeal. Court reversed and dismissed several charges and specifications with prejudice due to a violation of R.C.M. 707 grounds, but found no Sixth Amendment or Article 10 violation, and did not dismiss those offense discovered after the imposition of pretrial confinement. Court notes that because of the "all-or-nothing effect" or R.C.M. 910, allowing an appellant who enters a conditional plea to withdraw the if he prevails on appeal, "staff judge advocates are cautioned not to enter into conditional pleas unless the matter is case.

dispositive. . . . In this case, appellant's speedy trial issue was not case dispositive, because it did not require dismissal of those charges for which the appellant was not placed into pretrial confinement. However, because the conditional plea was authorized for all the offenses, we must allow the appellant to withdraw his pleas." The speedy trial clock for offenses discovered after the imposition of pretrial confinement began on the date of preferral of those charges

g. *See United States v. Lawrence*, 43 M.J. 677 (A.F. Ct. Crim. App. 1995), for an excellent discussion of the policy reasons behind conditional guilty pleas.

h. *United States v. Dies*, 43 M.J. 847 (N-M. Ct. Crim. App. 1995), *aff'd*, 45 M.J. 376 (1996). Conditional guilty plea preserved speedy trial issue under RCM 707. *See also United States v. Conklan*, 41 M.J. 800 (Army Ct. Crim. App. 1995) (conditional guilty plea preserved issue of waiver of transactional immunity and due process claims).

i. *United States v. Clinkenbeard*, 44 M.J. 577 (A.F. Ct. Crim. App. 1996). Appellant entered conditional pleas, at BCD-SPCM, to carnal knowledge and two instances of failure to go, sodomy with a minor, disobedience of an order, and three motor vehicle accidents. Nature of conditional plea was that the Federal Assimilative Crimes Act, 18 U.S.C 13 (FACA) did not assimilate non-criminal traffic offenses occurring on base. FACA may not be used to convict accused of state law traffic infractions if those infractions have been decriminalized. Conditional guilty plea preserved motion to dismiss. *See also United States v. Dies*, 42 M.J. 847 (N.M. Ct. Crim. App. 1995), *aff'd*, 45 M.J. 376 (1996) (conditional guilty plea preserved speedy trial issue under RCM 707).

j. *United States v. Tarleton*, 47 M.J. 170 (1997). An issue or argument that was not raised at trial and not included as a written part of a conditional guilty plea cannot form the basis of a plea for appellate relief. At trial, the accused's conditional guilty plea preserved for appellate review the issue of admissibility of his confession based on argument that his waiver of Article 31 rights was involuntary because he was not informed that he was a suspect. Accused was foreclosed, therefor, on appeal from asserting that the confessions should have been suppressed due to the failure of military police to apprise him that evidence from command directed urinalysis, which prompted his confession, was not admissible at court-martial.

6. Providence or *Care* Inquiry. *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969). "the record of trial. . . must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president has questioned the accused [under oath] about what he did or did not do, and what h intended."

a. *United States v. Bates*, 40 M.J. 362 (C.M.A. 1994). Accused in carnal knowledge prosecution told MJ "I had attempted intercourse with my daughter. I touched my penis to her vagina. She had said that it hurt. I stopped" The court indicates "attempt" in context of providence inquiry was a "term of art." Plea not rendered improvident. Dissent by J. Wiss: "The providence inquiry is a model of inadequacy" and MJ did not advise accused of requirement of "penetration."

b. *United States v. Sweet*, 38 M.J. 583 (N.M.C.M.R. 1993); *aff'd*, 42 M.J. 183 (1995). Navy court indicates military judge is not required in every case to question accused to elicit statements of fact that simply paraphrase facts contained in stipulation of fact. Factual basis is established when accused admits to tailored elements, and stipulation accompanies inquiry. Court cautioned that more detailed questioning "is strongly encouraged, however, and may be required depending on the nature of the case and the contents of the stipulation. An in-depth personal colloquy offers the best chance to discover and obviate misunderstandings."

c. *United States v. Langston*, 53 M.J. 335 (2000). Defense requested exclusion of witnesses from courtroom during providence inquiry. Military judge refused the request, ruling, incorrectly, that Mil. R. Evid. 615 did not apply to providence inquiry. CAAF held the accused was not prejudiced, however, as the bulk of the witnesses' testimony went to victim impact.

1. Advice Concerning Rights Waived by Plea

a. *United States v. Vonn*, 535 U.S. 55 (2002). Vonn charged with armed bank robbery and using and carrying a firearm during a crime of violence. During his first appearance following arrest, the Magistrate Judge informed Vonn of his constitutional rights, including the "right to retain and to be represented by an attorney of [his] choosing at each and every stage of the proceedings." Vonn was again informed of this right three days later at his arraignment. On his third appearance, Vonn indicated that he would plead guilty to armed bank robbery but would go to trial on the firearms offense. In accordance with Fed. R. Crim. P. 11 (upon which R.C.M. 910 is based), the judge then advised Vonn of the rights he would give up by pleading guilty, but "skipped the required advice that if Vonn were tried he would have 'the right to the assistance of counsel.'" Several months later, following indictment on an additional offense, Vonn entered pleas to the new offense and the firearm charge. Again the judge neglected to render the required advice about counsel, despite the government attorney calling the omission to the judge's attention. Eight months later, Vonn attempted to withdraw his plea on the firearms charge. The judge denied the request and sentenced Vonn to 97 months in prison. On appeal, Vonn attempted to set aside all his pleas due to the judge's failure to render complete advice concerning the right to counsel. HELD: First, this type of unobjected to error during guilty plea advice is reviewed for plain error, rather than harmless error; as such, Vonn bears the burden of proving error, that is plain and obvious, and that affects his substantial rights. Second, in determining whether there is plain error in a guilty plea advisement, the court may look beyond the plea colloquy itself to other parts of the official record to see whether the defendant's substantial rights were affected. Because the Circuit Court of Appeals considered only the plea colloquy, the Court reversed and remanded for further consideration in light of its opinion. On remand, the Circuit Court affirmed the conviction. *United States v. Vonn*, 294 F.3d 1093 (9th Cir. 2003).

b. *United States v. Dominguez Benitez*, 124 S. Ct. 2333 (2004). The Accused's PTA contained a safety valve provision reducing his sentence below the mandatory minimum of ten years. The Accused's PTA stated that the agreement, however, did not bind the sentencing court and that he could not withdraw his guilty plea if the sentencing court rejected the government's recommended safety valve reduction. During the plea inquiry, the judge failed to advise the accused pursuant to Fed. R. Crim. Proc. 11 (upon which R.C.M. 910 is based) that the accused could not withdraw his plea if the reduced sentence was not given. Between the providency inquiry and sentencing, the probation office determined that the accused had previous convictions under a different name making him ineligible for the safety valve and the reduced sentence. On appeal the accused alleges the judge's failure to advise him of his rights under Rule 11 warranted withdrawal of his plea. The Supreme Court ruled when an accused raises a Rule 11 error on appeal, the accused must show the error is "plain" and "a reasonable probability that, but for the error, he would not have plead guilty." Based on the evidence against the accused and the warning provided in the PTA, the Court believed the Rule 11 error "tends to show that [it] made no difference to the outcome here." Placing the burden of proof on the accused: (1) encourages timely objections, (2) reduces wasteful reversals by demanding strenuous exertion to get relief on unpreserved error, and (3) places emphasis on the finality of guilty pleas, which rest on the accused's admission of guilt in open court which is indispensable in the operation of the modern criminal system. *See also United States v. Vonn*, 535 U.S. 55 (2002) (holding when an accused is late in raising a Rule 11 error reversal is not required unless the error is plain and affects the accused substantial rights, as proven by the defense, upon review of the entire record not only the plea proceedings).

c. *But see United States v. Hansen*, 59 M.J. 410 (2004). The MJ's failure to appraise the accused of his right to confront witnesses and right against self-incrimination required reversal when the record failed to show the accused's plea was voluntary and informed. "[T]he military judge is required to ensure the accused personally understands the rights he is about to waive." Although the MJ also failed to advise the accused of his right to a trial of the facts by the court, the CAAF could determine, from the record, that the accused still voluntarily and knowingly waived that specific right. Chief Justice Crawford, in dissent, advocates adopting the *Vonn/Dominquez Benitez's* plain error test, placing a burden upon the defense in ensuring the accused understands his rights.

2. Use of information gained during the providence inquiry.

a. Mixed Plea Situation.

(1) General Rule: Military judge should defer informing court members of the offenses to which the accused pled guilty until after findings are announced on the contested offenses. RCM 913(a); RCM 910(g) Discussion; *United States v. Smith*, 23 M.J. 118, 120 (C.M.A. 1987). *See also United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993). A.C.M.R. observed that it was inappropriate to so advise members, and tested for prejudice, and found remedial measures were needed.

(2) Exceptions: (a) If the accused requests members be informed of guilty pleas, or (b) if guilty plea to LIO and the Gov't intends to prove the greater offense. RCM 913(a), Discussion. Military judge committed error in not cleaning up flyer, which reflected greater offense to which the accused pled not guilty and which the Gov't did not intend to pursue, was not waived by accused's failure to object. Sentence set aside. *United States v. Irons*, 34 M.J. 807 (N.M.C.M.R. 1992).

(3) *United States v. Kaiser*, 58 M.J. 146 (2003). Appellant, an instructor at the Defense Language Institute, was charged with numerous violations arising from improper relationships with students. Appellant pled guilty to some of the offenses; military judge informed the panel of the guilty plea prior to commencement of trial on the merits. When the defense raised a question as to why the offenses to which the appellant plead guilty were on the flyer that the members would see, the MJ mistakenly replied that he MJ Benchbook required members be informed of guilty pleas. The panel convicted appellant of two additional offenses, and found him not guilty of other offenses. HELD: "The law in this area is clear – in a mixed plea case, in the absence of a specific request made by the accused on the record, members of a court-

martial should not be informed of any prior pleas of guilty until after the findings on the remaining contested offenses are made. This rule is long standing and embodied in the Benchbook." Error was prejudicial and required reversal of findings and sentence, as it directly impacts the presumption of innocence and the fundamental right to a fair trial. Trial counsel intimated that the pleas might serve as a basis for "inferring" something, and appellant was found guilty of the offenses similar to those to which he had pled guilty, and not guilty of the dissimilar ones.

(4) *United States v. Ramelb*, 44 M.J. 625 (Army Ct. Crim. App. 1996). Accused pled guilty to lesser included offense of wrongful appropriation. During case to prove the greater offense of larceny, Gov't called witness who sat in courtroom during accused's providence inquiry to testify as to everything accused said. Accused convicted of larceny. Court holds that it is error to use accused's statements given during providence inquiry to prove greater offense. Correct procedure is to use the ***plea*** of guilty to a lesser included offense to establish the common elements between the lesser and greater offense.

(5) *United States v. Grijalva*, 55 M.J. 223 (2001). The accused shot his wife. At trial the MJ rejected the accused's plea of guilty to attempted premeditated murder, but accepted his plea to the lesser-included offense of aggravated assault by intentional infliction of grievous bodily harm. Then, after trial on the merits on the greater offense in which the MJ used the accused's admissions during the guilty plea inquiry, the MJ convicted the accused of attempted premeditated murder. Following settled case law, the CAAF held the MJ could properly use the accused's plea to a lesser-included offense to prove a greater offense, but that when a plea of guilty is rejected any statement made by an accused during the plea inquiry is inadmissible. However, finding the MJ's error harmless beyond a reasonable doubt the CAAF affirmed.

b. Sentencing.

(1) *United States v. Holt*, 27 M.J. 57 (C.M.A. 1988). Sworn testimony given by accused during providence inquiry may be received as admission at sentencing hearing and can be provided either by properly authenticated transcript or by testimony of court reporter or other persons who heard what accused said during providence inquiry. *See also United States v. Dukes*, 30 M.J. 793 (N.M.C.M.R. 1990). Navy court indicated that *Holt* permits the trial counsel to offer an accused's responses during the providence inquiry into evidence, "but that such responses are not automatically in evidence. . . an accused must be given notice of what matters are being considered against him . . . opportunity to object. . . on grounds of improper aggravation, undue prejudice, or whatever."

(2) *United States v. Irwin*, 43 M.J. 479 (1995). Accused description of his misconduct (AWOL, rape, sodomy, indecent acts, kidnapping, threats, and unlawful entry) was so detailed and graphic that TC played tape-recording to members. CAAF finds tape constituted aggravating circumstances per RCM 1001(b)(4) and was not cumulative because there was no stipulation (No PTA). Court (in footnote) pointed out that MJ did not advise accused that statements made during providence inquiry could be considered in sentencing. (Remember, this evidence must meet all requirements, including Mil. Rules of Evid. 401, 402, 403 and 901).

(3) *United States v. Figura*, 44 M.J. 308 (1996). CID agent charged with forgery. Gov't sought to use providence inquiry to establish the dates of checks, where written, and where the checks were cashed because information did not appear in stipulation of fact. Parties agreed to have MJ summarize for court members the information stated during providence inquiry, rather than have a written stipulation of spectator testify. Court holds there is no demonstrative right or wrong way to introduce evidence taken during providence inquiry, and that MJ giving summary to members was probably to accused's advantage.

3. Misunderstandings of maximum possible sentence may render plea improvident.

a. All factors are examined to determine if misapprehension of maximum punishment affected guilty plea, or whether the factor was insubstantial in accused's decision.

b. *United States v. Silver*, 40 M.J. 351 (C.M.A 1994). After findings in provident guilty plea, MJ noticed that maximum punishment was 5 years more than he had previously advised the accused. MJ asked accused if he still wished to plead guilty. Accused indicated he did. No error on part of MJ by failing to expressly advise accused (per the MJ Benchbook) of his right to withdraw his plea.

c. *United States v. Mincey*, 43 M.J. 376 (1995). Accused charged with bad checks and wrongful appropriation. MJ advised accused max confinement was 6-1/2 years and *DD*. Pretrial agreement was 39 months. Correct maximum was 109 months (9 years and 1 month) and *BCD*. No prejudice.

d. *United States v. Ontiveros,* 59 M.J. 639 (C.G. Ct. Crim. App. 2003) (incorrect advice as to maximum sentence did not render plea improvident where evaluation of all the circumstances of the case revealed that it was "an insubstantial factor in the decision to plead guilty). *Accord United States v. McAuley*, 59 M.J. 697 (C.G. Ct. Crim. App. 2004) (companion case to *Ontiveros*); *United States v. Blodgett III,* ACM 35267, 2004 CCA Lexis 160 (A.F. Ct. Crim. App. July 30, 2004). *See* four factors in *United States v. Poole*, 26 M.J. 272 (C.M.A. 1988).

IV. PRETRIAL AGREEMENTS.

B. RCM 705(a): "Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule."

C. Formation.

1. Oral pretrial agreement. *United States v. Mooney*, 47 M.J. 496 (1997). MJ erred by accepting accused's guilty plea and pretrial agreement after it was clear that pretrial agreement was not in writing as required by RCM 705(d)(2). *However*, while the CAAF criticized counsels' and the MJ's disregard for the rule, Court holds that reversal of conviction not required where the specific terms of the oral agreement are placed on the record, all parties acknowledge and comply with terms of agreement, and accused concedes that he received the benefit of the bargain. Accused suffered no harm under UCMJ art. 59(a).

2. *United States v. Forester*, 48 M.J. 1 (1998). Term in *stipulation of fact* which required the accused to waive his right to "any and all defenses" did not violate RCM 705 or public policy. The CAAF cautions the Government not to attempt to avoid the requirements of RCM 705(c)(1)(B) by including terms in a document other than the pretrial agreement itself (terms must not be in a stipulation of fact).

D. Waiver. *United States v. Robbins*, 52 M.J. 159 (1999). A guilty plea "waives any objection . . . insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made." A guilty plea does not waive a claim of lack of jurisdiction or failure to state an offense. Here, the CAAF held the accused had not waived a preemption challenge to his guilty plea to involuntary manslaughter by causing the death of a fetus (an Ohio statute applicable via Article 134 and the Assimilated Crimes Act) (a question of subject matter jurisdiction). Nevertheless, the CAAF found that the assimilation of the offense was not preempted, although the court did strike the "manslaughter" language from the specification to reaffirm that the conviction was not premised on homicide (which would be preempted by the UCMJ) but on the commission of a felony which wrongfully terminates of another's pregnancy.

E. Failure to Define Elements/Factual predicate for plea.

1. *United States v. Hardeman*, 59 M.J. 389 (2004). Plea improvident because a definitive report date is necessary for an AWOL specification. The providency inquiry did not ultimately reveal the date on which the accused was willing to admit he went AWOL.

2. *United States v. Redlinski*, 58 M.J. 117 (2003). MJ erred by failing to adequately explain elements of attempted distribution of marijuana; plea improvident and set aside. MJ failed to advise appellant that the offense requires an overt act done with specific intent, and that the act amounted to more than mere preparation and apparently tended to effect the commission of the intended offense – the four elements of an attempt offense. In order for plea to be knowing and voluntary, the record of trial must reflect that the elements of each offense charged have been explained to the accused by the military judge. If the MJ fails to do so, plea must be set aside unless "it is clear from the entire record that the accused knew the elements, admitted them freely, and pleaded guilty because he was guilty" (citation omitted). The Court "looks to the context of the entire record to determine whether an accused is aware of the elements, either explicitly or inferentially" (citation omitted). For a plea to an attempt offense, "the record must objectively reflect that the appellant understood that his conduct, in order to be criminal, needed to go beyond preparatory steps and be a direct movement toward the commission of the intended offense."

3. *United States v. Barton*, 60 M.J. 62 (2004). MJ did not repeat larceny elements for each larceny and conspiracy to commit larceny offense but rather cross-referenced his predicate statement of elements. For one specification, the Accused failed to state and the stipulation of fact failed to mention that the value of the stolen property exceeded $100. The only admission regarding value existed in the accused's acknowledgement that he understood the elements of the larceny offense based on the MJ's cross-reference. In affirming the providency of the plea, the CAAF reasoned that the value determination is not a complex legal element and the MJ made the accused look at the charge sheet for each specification and the specification in issue clearly stated the stolen property exceeded $100. The CAAF cautioned, however, "we may have doubts that a similar methodology of cross-reference will work generally."

4. *United States v. Negron*, 60 M.J. 136 (2004). Accused pled guilty to depositing obscene matters in the mail in violation of Article 134, UCMJ. During the providency inquiry the MJ failed to provide the correct definition of "obscene." An accused is not provident to an offense when the MJ uses a substantially different definition of "obscene" from that proscribed by the offense charged. Additionally, the CAAF cautioned MJs "regarding the use of conclusions and leading questions that merely extract from the [accused] 'yes' and 'no' responses during the providency inquiry."

5. *United States v. Mason, Jr.*, 60 M.J. 15 (2004). The accused pled guilty to possessing child pornography under Article 134, clause 3 (crimes and offenses not capital) prior to the Supreme Court's ruling in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002) (holding visual depictions that "appear to be" of children are not criminal). The MJ defined the elemental term of "child pornography" by using the "appear to be" language later struck down in *Free Speech Coalition.* The CAAF ruled this improper definition made the accused's plea to the Article 134, clause 3 offense improvident. The MJ, however, advised the accused of an additional element, under Article 134, clause 2, that his conduct was of a nature to bring discredit upon the armed forces. The accused admitted his conduct of possessing child pornography was service discrediting and the court sustained his plea under Article 134, clause 3's LIO of Article 134, clause 2. *See U.S. v. Irvin*, 60 M.J. 23 (2004) (determining an accused's plea to possessing child pornography under Article 134, clause 2 was provident). *United States v. Anderson*, 60 M.J. ___, 2004 CCA LEXIS 152 (A.F. Ct. Crim. App. 2004). Plea to possessing child pornography overturned where judge failed to advise and accused failed to state the pictures were of actual children. Court did find accused guilty of lesser included offense of Article 134, clause 2, conduct of nature to bring discredit upon the armed forces.

6. *United States v. McCrimmon*, 60 M.J. 145 (2004). Accused drill instructor pled guilty to bribery for asking for and receiving money from trainees to protect them from receiving an Article 15 for going to the PX without authorization. At the time of the bribe, the accused knew the Article 15 was a scare tactic by the first sergeant. ACCA questioned whether the accused could intend for the bribe to influence his official actions, an element of bribery, if he knew the Article 15 was merely a scare tactic. Although the first sergeant's threat of the Article 15 was a bluff, the CAAF held the bribe could still influence the accused in his official actions because he still possessed the power to recommend an Article 15 to the company commander. In upholding the bribery conviction, the CAAF focused on the detailed dialogue between the MJ and the accused regarding bribery and its intent element and the detailed stipulation of fact explicitly establishing the accused's intent to be influenced by the bribe.

7. *United States v. Fox*, 50 M.J. 444 (1999). Accused received an item of mail at her off-base residence. The address on the envelope apparently listed appellant's place of residence, but the addressee on the envelope was a different person, Mr. David S. Cogdill. Accused opened envelope without realizing that it was addressed to someone else, found a check made out to Mr. David S. Cogdill, and subsequently cashed the check. She pleaded guilty to theft of mail matter. Citing to the analogous federal statute and a split in federal case law, she challenged her plea on the ground that an item in the mail loses its quality as "mail matter" once it is delivered to the place listed on the envelope, even if the named addressee is not located at that place. The CAAF noted that the MCM offense of mail theft applies from the point that an item is "deposited in a postal system" until it is "delivered to or received by the addressee." Her plea was provident.

8. *United States v. Falk*, 50 M.J. 385 (1999). Accused's plea to a violation of the child pornography statute, 18 USC § 2252, was improvident. The statute penalized "knowingly possess[ing] 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction" of child pornography. Congress later created a new section, § 2252A (making it a crime to possess "any book, magazine, periodical, film, videotape, computer disk, or any other material that contains 3 or more images" of child pornography), but this statute had not been enacted at the time of accused's trial. Accused pleaded guilty to possessing 126 computer images depicting minors engaging in various sex acts. The CAAF held that a single computer hard drive is more like a single "book" and that the accused's plea, based on the facts in the record, was not provident, nor could he be found guilty under the statue alleged. The accused fell through a "loophole" in the statute which required the setting aside of that finding and the sentence.

9. *United States v. Schuler*, 50 M.J. 254 (1999). Accused who pleaded guilty to carnal knowledge stated that, at the time of the offense in August 1994, he believed that his 14-year-old victim was of college age, as she allegedly had told him. These statements did not affect the providence of his pleas because the defense of reasonable mistake of fact was not available at the time of the offense or the trial. He argued the providence of his plea should be assessed because, while his case was on direct review, Congress amended the law to permit a defense of reasonable mistake of fact. Citing 1 USC § 109, however, the CAAF held that the amendment to Article 120 provides members of the armed forces with an opportunity to raise the defense of mistake of fact and, as such, the change is not within the narrow class of legislative actions that would preclude application of the general federal savings statute.

10. *United States v. Grimm*, 51 M.J. 254 (1999). Fact that accused secreted a disassembled 9 mm pistol on his person supported his plea of guilty to carrying a concealed weapon under Article 134. The accused challenged the conviction on appeal, claiming a disassembled pistol could not be a dangerous weapon. While acknowledging *United States v. Davis*, 47 M.J. 484 (1998) (unloaded pistol not a dangerous weapon within the meaning of Article 128), the court noted that what constitutes a "dangerous weapon" is a question of fact, and the weapon's disassembled state was merely "one circumstance, among many, which can be considered by the fact finder." The accused did not show a "substantial basis" for reversal of his conviction: He showed merely one fact which could support an argument that the gun was not a weapon or dangerous, among other things. Accused conceded these factual issues at trial when he pleaded guilty. "Post trial speculation" as to the factual issues will not "be countenanced" by the court.

11. *United States v. Thomasson*, 50 M.J. 179 (1999). Accused engaged in a scheme to obtain fraudulent refunds from a military exchange for clothes stolen from the exchange. When a civilian store detective became suspicious, the accused fled in her car. The MPs were summoned in pursuit, and she continued to drive in her car for about two minutes before pulling over. The accused's plea to resisting apprehension was improvident. Under Article 95 as it existed at the time of the conduct in question, flight from a law enforcement officer, unaccompanied by any other act of resistance, did not constitute the offense of resisting apprehension. The colloquy between the military judge and appellant with respect to the offense of resisting apprehension focused exclusively on her flight from the MP. The military judge did not inquire as to any act of resistance other than flight. Error harmless as to sentence.

12. *United States v. Bickley*, 50 M.J. 93 (1999). Accused pleaded guilty to violation of a lawful general regulation for having a .22 caliber rifle in his room in violation of paragraph 2-4 of Fort Stewart Regulation 190-2 (27 October 1995), which prohibited storage of weapons in living spaces. Accused testified he had been storing the weapon at his girlfriend's residence, but she returned the weapon to him at 0130 hours on the morning of the inspection, and he planned to return it to the arms room when it opened at 0900 hours. He felt he could keep it in his room because he had heard that the commander had authorized soldiers to turn weapons into the arms room within 72 hours. Actually, the commander permitted a 24 hour grace period. The CAAF held that accused's vague and ambiguous musings did not provide a "'substantial basis' in law and fact for questioning the guilty plea."

13. *United States v. Olinger*, 50 M.J. 365 (1999). Accused pleaded guilty to absence without leave and missing movement. During sentencing, he stated that he decided to miss the movement of his ship because his wife was suffering from severe depression and his departure "might kill her." He claimed on appeal that his comments reasonably raised the necessity defense, a matter substantially in conflict with his plea. The court held that the statement by the accused, without further details establishing an immediate threat of death or grievous bodily harm to his wife, or establishing that there were no alternative sources of assistance for his wife other than his going AWOL, did not render his plea invalid. Although declining to say whether the necessity defense was available in the military, or whether more expansive comments would raise the narrower defense of necessity, the court noted it would not overturn the plea based on a "mere possibility" of a defense.

14. *United States v. Smith*, 50 M.J. 380 (1999). Accused pleaded guilty to attempted larceny of funds from a bank. The providence inquiry revealed that, using personal information obtained from an unwitting soldier in her unit, she and a co-conspirator planned to obtain a false credit card and use the card to make purchases. The coconspirator then called the bank and requested the card. However, the bank cancelled the credit card before it was issued. The court held that the accused had admitted sufficient facts to show a substantial step beyond mere preparation.

F. Pleas to lesser included offenses.

1. Normally, when an accused pleads guilty to a lesser included offense, and the government intends to try to prove the greater offense before a panel, it is incumbent upon the military judge to instruct the panel that they may accept certain previously admitted elements of the greater offense as proven. RCM 913(a) Discussion. In cases of multiple offenses, however, the military judge should instruct the panel that it may not use the plea of guilty to one offense to establish the elements of a separate offense. RCM 920(e) Discussion; *cf. United States v. Hamilton*, 36 M.J. 723 (A.C.M.R. 1993). Should the military judge so instruct, it is generally considered error. *Id.*

2. Waiver. *United States v. Smith*, 50 M.J. 451 (1999). The accused was charged with raping and sodomizing H, his stepdaughter. He was also charged with indecent acts arising from those offenses. He pleaded guilty by exceptions and substitutions to the indecent acts offense (this offense alleged that he had placed his fingers into her into – and is penis upon - H's vagina and anus; the accused claimed that he had penetrated her anus and vagina with his fingers and that he had placed his penis on her vulva, but that he had not placed his penis on her anus). He denied ever raping her or attempting to sodomize her). The accused further stated that the actions took place on three different occasions in June, July, and August (he was charged with committing the indecent acts "from…June 1995 to … August 1995"). The military judge instructed the panel that they could consider that the accused's plea to Charge III established certain elements of Charge III, as well as certain elements of Charge I and Charge II (the rape and sodomy offenses). The CAAF treated the issue on appeal as one of instructional error, and, applying the waiver provision of RCM 920(f), found the defense counsel's actions amounted to an affirmative waiver of the requirement for the prophylactic instruction concerning the use of the accused's plea.

3. *United States v. Nelson*, 51 M.J. 399 (1999). Accused sought to enter a plea of guilty to the AWOL, but moved to preclude the use of his statements during providence inquiry on the merits of the other offenses. The military judge denied the motion, the accused entered pleas of not guilty, and he was convicted of all charges. The Army Court of Criminal Appeals affirmed the findings and sentence without opinion. The CAAF ruled the accused had not preserved for appeal the issue of whether the military judge erred in ruling that the accused's providence inquiry admissions could be used against him on the merits of the other offenses. The CAAF then set aside the ACCA decision on unrelated grounds.

G. Pleas and the privilege against self-incrimination. *Mitchell v. United States*, 526 U.S. 314, 119 S. Ct. 1307, 143 L. Ed. 2d 424 (1999): A defendant's right under the Self-Incrimination Clause of the Fifth Amendment applies during sentencing in a criminal case.

H. Contents of Pretrial Agreements.

1. Permissible Terms and Conditions.

a. A promise to enter into a stipulation of fact concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered. *See United States v. Bertelson*, 3 M.J. 314,315 (C.M.A) 1977).

b. A promise to testify (or provide assistance to investigators) as a witness in the trial of another person;

c. A promise to provide restitution. *United States v. Mitchell*, 46 M.J. 840 (N.M. Ct. Crim. App. 1997). An accused who fails to make full restitution pursuant to a defense proposed term in PTA is not unlawfully deprived of the benefit of the PTA where the failure to comply with the restitution obligation is based on indigence. Accused uttered bad checks and defrauded financial institutions of $30,733.00. The defense proposed a term which required accused to make full restitution in exchange for suspension of confinement in excess of 60 months. The accused was sentenced, *inter alia*, to 10 years confinement. While in jail, the accused made partial restitution until his business failed. The accused, now indigent, cannot necessarily use indigence to negate operation of PTA term requiring full restitution. CA properly vacated suspension under PTA.

d. A promise to conform the accused's conduct to certain conditions of probation. *See United States v. Spriggs*, 40 M.J. 158 (C.M.A. 1994). COMA indicates that an indeterminate term of suspension (up to 15 years to complete sex offender program) was not appropriate.

e. Misconduct Provision. *United States v. Tester*, 59 M.J. 644 (Army Ct. Crim. App. 2003). As part of plea offer, appellant agreed to not violate any punitive article in the UCMJ. In exchange, convening authority agreed, *inter alia*, to defer any adjudged confinement until action and to suspend any confinement for twelve months. Appellant got DUI off post fifteen days after his court-martial. Court held that although provision is specifically listed as permissible in R.C.M. 705, convening authority followed wrong procedure to vacate the deferral. Convening authority followed rescission of deferment provisions of R.C.M. 1101(c). This was incorrect. CA must follow vacation procedures of R.C.M. 1109. Because appellant was denied due process protections of R.C.M. 1109, his confinement was improper and was set aside.

f. A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings. *United States v. Gansemer*, 38 M.J. 340, (C.M.A. 1993); Court upholds PTA requiring accused to waive admin. board if CM failed to impose BCD. Court says not in violation of public policy considerations or fundamental fairness: Accused can ask for discharge in lieu of court-martial; valid bargaining chip; and, no overreaching. (3-2 decision).

g. A promise to waive a request for Art. 13 credit.

(1) *United States v. McFadyen*, 51 M.J. 289 (1999). Accused's waiver of Article 13 issue as part of pretrial agreement does not violate public policy. As of 20 November 1999, for all cases in which "a military judge is faced with a pretrial agreement which contains an Article 13 waiver, the military judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." Here, accused agreed to plead guilty and, in exchange for a sentence limitation, to waive his right to challenge his pretrial treatment under Article 13, UCMJ. Accused was an airman who complained about his treatment in pretrial confinement at a Navy brig (e.g., stripped of rank, prevented from contacting his attorney, and his phone calls monitored). While announcing a prospective rule only, the court found no reason to disturb the waiver here: Accused did not contest the voluntariness of waiver, an inquiry was conducted by the military judge, the accused was allowed to raise and argue in mitigation his claims of ill-treatment at the hands of the Navy, and the military judge was able, if he wished, to consider the nature of the pretrial confinement in determining the amount of confinement appropriate as a punishment.

(2) *United States v. Inong*, 58 M.J. 460 (2003). CAAF overrules *United States v. Huffman*, 40 M.J. 225 (C.M.A. 1995), in which court refused to apply doctrine of waiver to issues of unlawful pretrial punishment in violation of Article 13, UCMJ, in the absence of an affirmative, fully developed waiver on the record. Court holds that article 13 issues are henceforth waived if not raised at trial. Court does not specifically overrule *McFadyen*, which does not rely on *Huffman* rationale.

g. Mandated Waiver of Members. *United States v. Burnell*, 40 M.J. 175 (C.M.A. 1994). Government would not agree to two-year sentencing limitation unless accused waived members. COMA rules that with accused's voluntary and intelligent waiver, PTA did not violate public interest. Even if government had declined *any* PTA unless accused waived members, the "government would not be depriving appellant of anything he was entitled to." *See also United States v. Andrews*, 38 M.J. 650 (A.C.M.R. 1993). Government indicated during pre-trial negotiations that if accused elected trial with members, "then the quantum portion would be higher than if we went with military judge alone." A.C.M.R. says "[W]e hold that the change to RCM 705 now permits the government to propose as a term of the pretrial agreement, that the appellant elect trial by military judge alone, and the amount of the sentence limitation may depend on that election."

h. Agreement Not to Discuss Alleged Constitutional Violation. *United States v. Edwards*, 58 M.J. 49 (2003). As part of PTA, appellant agreed not to discuss, in his unsworn statement, any circumstances surrounding potential constitutional violations occurring during AFOSI's interrogation of him (interrogation after detailing of defense counsel without first notifying defense counsel). If a provision is not contrary to public policy or R.C.M. 705, accused may knowingly and voluntarily waive it. R.C.M. 705 does not prohibit this pretrial term, and specifically does not deprive the appellant of the right to a complete sentencing proceeding. Military judge conducted detailed inquiry of the accused to determine he knowingly and voluntarily agreed to it, and whether he understood the implications of his waiver.

i. Suspension Terms. *United States v. Wallace*, 58 M.J. 759 (N-M. Ct. Crim. App. 2003). Appellant sentenced to life without parole. In accordance with his pretrial agreement, the convening authority suspended all confinement in excess of thirty years for the period of confinement plus twelve months after appellant's release. Appellant argued that the period of suspension could only be five years from the date sentence was announced. HELD: Pretrial agreement provision suspension period for the period of confinement and one year from date of release does not violate public policy. R.C.M. 1108 states that a period of suspension should not be unreasonably long. "It is this Court's opinion that placing Appellant on probation for 31 years of an adjudged life sentence without possibility of parole is not unreasonably long and does not violate public policy."

j. Waive Comparative Sentence Information. *United States v. Oaks*, 2003 CCA LEXIS 301 (A.F. Ct. Crim. App. Dec. 10, 2003) (unpub.). Term waiving right to present comparative sentencing information in unsworn statement does not violate public policy. Term does not impermissibly limit right to present a full sentence case to the sentencing authority. Court finds *United States v. Grill*, 48 M.J. 131 (1998), inapposite, as presentation of sentence comparison material was not permitted by military judge; in contrast, appellant here agreed to waive his right under *Grill* in exchange for the benefits of a pretrial agreement.

k. Enrollment in Sexual Offender Treatment Program. *United States v. Cockrell*, 60 M.J. 501 (C.G. Ct. Crim. App. 2004). MJ failed to discuss with the Accused a provision in the PTA requiring the Accused to enroll in a sexual offender treatment program following his release from confinement and the ramifications if he failed to comply with that requirement. While the ramifications of failing to comply with the terms of the sexual offender treatment program were unclear in the PTA, and left unexplained by the MJ, the court does not state that requiring an accused to enroll in a sexual offender treatment program is a per se impermissible term.

l. Forfeiture of personal property. *United States v. Henthorn*, 58 M.J. 556 (N-M Ct. Crim. App. 2003). Criminal forfeiture of servicemember's personal computer, as set forth in pretrial agreement, was not an unduly harsh punishment and did not force the servicemember to forego a fundamental right.

2. Impermissible Terms and Conditions.

a. *United States* v. *Sunzeri*, 59 M.J. 758 (N-M. Ct. Crim. App. 2004). Term, originating with accused, that prohibited accused from presenting testimony of witnesses located outside of Hawaii either in person, by telephone, letter, or affidavit, violated public policy as it impermissibly deprived the accused of a complete sentencing proceeding.

b. *United States v. Copley*, ARMY 20011015, (Army Ct. Crim. App. Feb. 26, 2004) (unpub.). Increase in confinement cap from 12 to 13 months due to accused's exercise of his right to an individual military counsel which caused a delay in proceedings "inferentially implicated appellant's right to individual military counsel," and violated public policy. Court reassessed sentence and affirmed only 11 months confinement

c. *United States v. Thomas*, 60 M.J. 521 (N-M. Ct. Crim. App. 2004). Where an Accused's sentence could include death and required a mandatory minimum of confinement for life for a premeditated murder conviction, any PTA provision precluding the accused from accepting clemency, if offered, violates public policy.

d. *United States v. Schmelzle*, No. 200400007, 2004 CCA LEXIS 148 (N-M. Ct. Crim. App. July 14, 2004) (unpub). Based on the Accused's eligibility for retirement, a PTA provision requiring the Accused to agree not to request a transfer to the reserve, if a BCD was not given, violated public policy.

e. *United States v. Libecap*, 57 M.J. 611 (C.G. Ct. Crim. App. 2002). Pretrial agreement which required accused to request a bad-conduct discharge in his unsworn statement is void as against public policy, as it interferes with the accused's right to a complete sentencing proceeding in violation of R.C.M. 705(c)(1)(B). This is so despite fact that appellant reached his pretrial agreement and did not request a bad-conduct discharge. Remedy is rehearing on sentence.

f. *United States v. States v. Cassity*, 36 M.J. 759 (N.M.C.M.R. 1992). Accused pleaded guilty in exchange for a pretrial agreement which would suspend a bad-conduct discharge, provided confinement for more than four months was adjudged. Confinement adjudged was for less than four months, and convening authority did not suspend the discharge. Agreement found to be contrary to public policy and fundamentally unfair.

g. *United States v. Clark*, 53 M.J. 280 (2000). A provision of PTA required accused to agree to "reasonable stipulations concerning the facts and circumstances" of his case. Both sides agreed to a stipulation which included a reference to the accused's "deception indicated" polygraph. On appeal, the accused argued such evidence violated Mil. R. Evid. 707. The CAAF held the receipt of the polygraph information was obvious error, but there was no reason to believe the military judge relied on the information in accepting accused's pleas. While affirming the case, the CAAF noted the that a PTA provision requiring the admission of polygraph evidence should not be enforced.

h. *United States v. Conklan*, 41 M.J. 800 (Army Ct. Crim. App. 1995). Pretrial agreement in which the quantum portion was increased if the accused raised claims of de facto immunity encumbered the accused's due process right to challenge the jurisdiction of the court-martial. The litigation of non-frivolous claims of lack of jurisdiction and immunity are not the proper subjects for plea bargaining.

i. *United States v. Rivera*, 46 M.J. 52 (1997), *affirming* 44 M.J. 527 (A.F. Ct. Crim. App. 1996). Term in pretrial agreement (PTA) which required that accused waive "all pretrial motions" was too broad, and purported to deprive accused of right to make motions that could not be bargained away. While record indicates that accused had no viable motions, counsel, military justice managers, and military judges should be on the lookout for such "explosive language" in PTAs. Term which required accused to "testify in any trial related in my case without a grant of immunity" did not violate public policy, *under facts of this case* (accused not yet called to testify).

j. *United States v. Forester*, 48 M.J. 1 (1998). Term in which required that accused to waive his right to "any and all defenses" did not violate RCM 705 or public policy. Accused charged with attempted housebreaking, attempted larceny, violation of a lawful general regulation, and aggravated assault. Requirement to waive all defenses was not overly broad, considering the fact that the accused failed to raise any defense during the providence inquiry or sentencing phase.

k. Waiver of Speedy Trial Impermissible. *See United States v. McLaughlin*, 50 M.J. 217 (1999). Term requiring accused to forego any motions which may be legally waived was void as against public policy and MCM in a case where accused also agreed to waived any speedy trial issue. Term violated RCM 705(c)(1)((B) and *United States v. Pruitt*, 41 M.J. 736, 738 (N.M. Ct. Crim. App. 1994)). The CAAF held that the provision was unenforceable, so the military judge should have declared it impermissible, upheld the remainder of the agreement, and then asked the accused if he wished to litigate the issue. If he declined to do so, the waiver would be clearer. Nevertheless, the accused must make a prima facie showing or colorable claim for relief. Despite 95 day delay, no showing of prejudice. Nothing in record to support such a motion. *See also United States v. Benitez*, 49 M.J. 539 (N.M. Ct. Crim. App. 1998). RCM 705(c)(1)(B) and public policy prohibit including the waiver of the right to a speedy trial as a term in a PTA. This rule applies to both constitutional and statutory speedy trial rights.

l. *United States v. Perlman*, 44 M.J. 615 (N-M. Ct. Crim. App. 1996), 48 M.J. 353 (1998) (sum. disp.) (affirming but expressing no opinion on whether term is lawful). Gov't argued that term in PTA permitted SPCMCA to execute vacation of suspension without forwarding case to GCMCA for action UP UCMJ art. 72 and RCM 1109. Court held that although PTA does not indicate that accused wanted to waive those rights, Congressional intent was to grant accused an important procedural Due Process right for vacation actions, and it is doubtful whether such rights are waiveable. *See also United States v. Smith*, 46 M.J. 263 (1997) (holding that a pretrial agreement term which provides for vacation proceedings and processing under UCMJ art. 72 and RCM 1109 in the event of future misconduct cannot be interpreted as waiver of general court-martial convening authority's (GCMCA) responsibility to review and take action on vacation).

h. *United States v. Forester*, 48 M.J. 1 (1998). Term in *stipulation of fact* leads the CAAF to caution the Government not to attempt to avoid the requirements of RCM 705(c)(1)(B) by including terms in a document other than the pretrial agreement itself (terms must not be in a stipulation of fact).

i. *United States v. Davis*, 50 M.J. 426 (1999). Accused offered a PTA in which he agreed to plead not guilty and, in exchange for a sentence limitation, to enter into a confessional stipulation and to present no evidence. The stipulation admitted basically all elements of the offenses except the wrongfulness of marijuana use and the intent to defraud concerning the bad check offenses). The CAAF found the provision violated the prohibition against accepting a confessional stipulation as part of a pretrial agreement promising not to raise any defense. *See United States v. Bertelson*, 3 M.J. 314 (CMA 1977). The CAAF cautioned against the use of such a proceeding, which circumvented Article 45(a), but found that the accused's due process rights were not prejudiced, since the military judge properly conducted a *Bertelson* inquiry concerning the stipulation and it was clear the accused entered the agreement knowingly and voluntarily.

2. Contents of Quantum.

a. Effect of changes to arts. 58(b) and 57(a), UCMJ.

(1) Art. 58(b) mandates total (or 2/3) forfeitures as a result of GCMs and BCD SPCM if an accused is confined for more than six months, or, when *any* confinement is adjudged in combination with a punitive discharge. Article 47(b) makes these provisions effective 14 days after sentencing or the date the CA approves the sentence, whichever occurs *first*. The CA may defer forfeitures (or reductions) until approval of a sentence. If these are to be made part of a pretrial agreement, the defense must still request deferral of the forfeitures during the initial 14-day period after trial.

(2) Under art. 58(b), if the accused has dependents, the CA may waive any or all forfeitures of pay and allowances for a period not to exceed 6 months, provided those funds are paid directly to dependents. The CA's decision to defer or waive forfeitures for dependents may be a term or condition of the pretrial agreement.

b. Fines. *United States v. Smith*, 44 M.J. 720 (Army Ct. Crim. App. 1996). Including fines as a term in pretrial agreements is a recognized "good reason" for imposing same, where agreement is freely and voluntarily assented to in order to avoid some more dreaded lawful punishment. The appellant was convicted of felony murder. The MJ imposed a fine as part of the sentence which required the accused to pay the United States $100,000 by the time he is considered for parole (sometime in the next century) or be confined for an additional 50 years or until he dies, whichever come first. While the Court holds the contingent confinement portion of the sentence was impermissible because it circumvented Secretary of Army parole authority, it reiterated that a fine is an otherwise permissible punishment and proper bargaining chip in pretrial agreements even if appellant does not realize an unjust enrichment.

c. Pretrial confinement credit.

(1) *United States v. Rock*, 52 M.J. 154 (1999). The accused secured a PTA limiting confinement to 36 months. The military judge awarded 8 months' credit for conditions on liberty, not amounting to confinement, that effectively punished the accused in violation of Article 13, UCMJ. The military judge applied the credit to the adjudged sentence, which included 61 months' confinement, reducing the adjudged confinement from 61 months to 53 months. There was no error: The quantum of the PTA or the adjudged sentence, whichever is less, establishes the maximum permissible confinement; *confinement credit* applies against that maximum. The period of time credited by the military judge did not involve confinement, nor was it tantamount to confinement, so there was no error in applying it to the adjudged sentence rather than the PTA's confinement limitation.

(2) *United States v. Spaustat*, 57 M.J. 256 (2002). Court holds that "in order to avoid further confusion and to ensure meaningful relief in all future cases after the date of this decision, this Court will require the convening authority to direct application of all confinement credits for violations of Article 13 or RCM 305 and all Allen credit against the approved sentence, i.e., the lesser of the adjudged sentence or the sentence that may be approved under the pretrial agreement, as further reduced by any clemency granted by the convening authority, unless the pretrial agreement provides otherwise.

d. CA Approval of any "Other Lawfully Adjudged Punishment." *United States v. Edwards*, 20 M.J. 439 (C.M.A. 1985). Where fine not mentioned in agreement and sentence includes total forfeitures plus $1,000.00 fine, the fine could not be approved.

3. Interpretation of pretrial agreements.

a. Ambiguities and intent of parties. *United States v. Acevedo*, 50 M.J. 169 (1999). A term in a pretrial agreement requiring the Government to suspend for 12 months and then remit a dishonorable discharge did not preclude approval of an adjudged bad conduct discharge. *See also United States v. Gilbert*, 50 M.J. 176 (1999) (identical holding in companion case).

b. Military Judge's responsibility. Must conform terms to intent of parties or allow accused to withdraw from PTA. *See Aviz v. Carver*, 36 M.J. 1026 (N.M.C.M.R. 1993).

c. Draftsmanship.

(1) *United States v. Womack*, 34 M.J. 876 (A.C.M.R. 1992). Accused submitted agreement to plead guilty to drunk driving if government would not go forward on related assault charge. PTA was silent as to punishment. MJ opined (after reading his sentence and comparing it to the PTA) that the literal meaning was CA can only impose "no punishment." *Court resolved ambiguity in favor of accused.*

(2) *United States v. Gooden*, 23 M.J. 721 (A.C.M.R. 1986). Where pretrial agreement provided that CA could approve no sentence in excess of a BCD, confinement for 2 months, forfeiture of two-thirds pay per month for two months, and reduction to the grade of PVT E-1, it was error to approve a reprimand. Remedy: use "any other lawful punishments, including a fine, may be approved."

(3) *United States v. Davis*, 20 M.J. 903 (A.C.M.R. 1985). Pretrial agreements are strictly enforced based on express wording of agreement where record established that parties interpreted its terms in a manner consistent with its plain language. "BCD" crossed out in sentence limitation and confinement raised from 7 to 18 months.

4. Unitary nature of pretrial agreement.

a. In absence of evidence to contrary, operation of sentence appendix to pretrial agreement on sentence of court not to be treated as divisible elements. *United States v. Brice*, 38 C.M.R. 134 (C.M.A. 1967); *United States v. Monett*, 36 C.M.R. 335 (C.M.A. 1966); *United States v. Neal*, 12 M.J. 522 (N.M.C.M.R. 1981).

b. *United States v. Barraza*, 44 M.J. 622 (N-M. Ct. Crim. App. 1996). The appellant pled guilty to sodomy and indecent acts in exchange for pretrial agreement which suspended confinement in excess of 46 months for 12 months from date of convening authority's action. Appellant was sentenced to 10 years, total forfeiture of pay and allowances, reduction to E-1, and a dishonorable discharge. Defense Counsel requested that the CA reduce confinement to aid the recovery process of appellant's family. The CA approved the sentence and modified the punishment by suspending all confinement in excess of 14 months and 6 days for a period of 36 months. The action was lawful under the pretrial agreement because confinement was actually reduced by 32 months and was 22 months less than the accused requested in his clemency petition, even though there was a 2 year suspension increase. The reduced confinement and increased suspension periods, taken together, did not exceed confinement period authorized by the pretrial agreement.

c. *United States v. Sparks*, 15 M.J. 895 (A.C.M.R. 1983). PTA: CA agrees to approve no sentence in excess of Conf x 4 mos; 2/3 Forf x 4 mos; Red to E1; & BCD. Sentence: Conf x 2 mos; 2/3 Forf x 6 mos; Red to E1; & BCD. CA may approve sentence as adjudged. *Overall* severity not increased by extra two month's forfeitures.

d. *United States v. Barratt*, 42 M.J. 734 (Army Ct. Crim. App. 1995). No PTA. Adjudged sentence: 16 months conf. and TF and E1. Accused requested CA substitute BCD for reduction in confinement to 6 months (New Sent. = BCD and 6 months conf.). CA may *not* approve a punitive discharge when punitive discharge not adjudged at trial. Punitive discharge, as a matter of law is not a LIO punishment to confinement. *See* 10 U.S.C ɜ 3811.

e. Avoid problem in PTA agreement by stating that CA will not approve "*any part* of a sentence in excess of..."

5. Immunity Issues.

a. Only the GCMCA may grant immunity.

b. Immunity does not extend to prosecutions in Federal District Court or state courts without coordination with HQDA and DOJ.

c. Problem area: De facto immunity. *See United States v. Jones*, 52 M.J. 60 (1999) (SJA's actions in pretrial negotiations conferred de facto transactional immunity on co-accused but there was no command influence and no material prejudice to the accused); *United States v Conklan*, 41 M.J. 800 (1995); *Samples v. West*, 38 M.J. 482 9C.M.A. 1994).

6. Ambiguous Terms.

a. *United States v. Acevedo*, 50 M.J. 169 (1999). Accused entered into a PTA which provided that " a punitive discharge may be approved as adjudged. If adjudged and approved, a dishonorable discharge will be suspended for a period of 12 months from the date of court-martial at which time, unless sooner vacated, the dishonorable discharge will be remitted without further action." The military judge sentenced appellant to confinement for 30 months, total forfeitures, reduction to E-1, and a bad-conduct discharge. The military judge then stated regarding the BCD, "there's nothing [in the PTA] about doing anything to a bad-conduct discharge so that is not suspended. Right?" to which both counsel agreed. The CA approved the BCD. The CAAF held that it appeared that all parties had the same understanding, i.e., that an unsuspended bad-conduct discharge was envisioned as a possible approved and executed punishment.

b. *United States v. Gilbert*, 50, M.J. 176 (1999). A companion case to *Acevedo.* The PTA had a similar provision relating to suspension of a DD, and also suspended confinement in excess of 6 months for 12 months. The military judge sentenced appellant to confinement for 12 months, reduction in grade to E-2, forfeiture of all pay and allowances for 12 months, and a bad-conduct discharge. The military judge recommended suspension of the BCD. The military judge noted the impact of the PTA, on the adjudged sentence. None of the parties commented with respect to the military judge's recommendation that the convening authority suspend the bad-conduct discharge, which would have been an empty gesture if the agreement already required it. The CAAF held the provision was lawful and that the BCD could be approved.

c. *United States v. Sutphin*, 49 M.J. 534 (C.G. Ct. Crim. App. 1998): Accused entered into a PTA that described five parts of the sentence covered by the agreement. One portion was characterized as the "amount of forfeiture or fine," and it included forfeitures of pay and allowances as being included under the agreement but did not mention the possibility of a fine; the last portion of the PTA stated "any other lawful punishment (which shall expressly include, among others, any enforcement provisions in the case of a fine)." The military judge never inquired whether the accused understood a fine could be approved and imposed. The military judge ensured the accused understood that the sentence was a limitation on what could be done with him. The military judge then instructed the members they could adjudge a fine, which they did ($5000), along with confinement and a punitive discharge. The court held the portion of the sentence which included a fine must be disapproved, since the reasonable conclusion was that only forfeitures may be approved.

7. Military Judges Must Inquire Into Terms of PTA.

a. *United States v. King*, 3 M.J. 458 (C.M.A. 1977) (holding military judge must secure from trial and defense counsel "confirmation that the written agreement encompasse[s] all of the understandings of the parties, and that the judge's interpretation of the agreement comport[s] with their understanding both as to the meaning and effect of the plea bargain."). *See also United States v. Green*, 1 M.J. 453 (C.M.A. 1976) (reasoning the military judge must establish "on the record that the accused understands the meaning and effect of each provision in the pretrial agreement.")

b. *United States v. Felder*, 59 M.J. 444 (2004). MJ did not inquire into a term of the PTA regarding a waiver of any motions for sentence credit based on Article 13 and restriction tantamount to confinement. Accused's counsel did inform the MJ that no punishment under Article 13 or tantamount to confinement occurred. While the MJ's failure to discuss the term was error, the accused failed to show the error materially prejudiced a substantial right.

c. *United States v . Rigg*, 59 M.J. 614 (C.G. Ct. Crim. App. 2003). MJ failed to resolve differing interpretations of pretrial agreement term purporting to defer confinement. *See also United States v. Scalo*, 59 M.J. 646, 652, (2003) (en banc) (Clevenger, J., dissenting).

8. Unintended Consequences and misunderstanding of terms.

a. *United States v. Lundy*, 60 M.J. 52 (2004). Accused entered into PTA term, whereby the CA agreed to defer any and all reductions and forfeitures until the sentence was approved and suspend all adjudged and waive any and all automatic reductions and forfeitures. For sexually assaulting his children, the accused (a SSG) was sentenced to a DD, confinement for 23 years, and reduction to E-1, which subjected him to automatic reduction and forfeitures. The CA attempted to suspend the automatic reduction IAW the PTA to provide the accused's family with waived forfeitures at the E-6, as opposed to the E-1, rate. The parties, however, overlooked AR 600-8-19 which precludes a CA from suspending an automatic reduction unless the CA also suspends any related confinement or discharge which triggered the automatic reduction. ACCA stated no remedial action was required because the Accused's family was adequately compensated with transitional compensation (TC), which ACCA concluded the Accused's family was not entitled to because they were receiving waived forfeitures, albeit at the E-1 rate. The CAAF, in reversing, held if a material term of a PTA is not met by the government three options exist: (1) the government's specific performance of the term; (2) withdrawal by the accused from the PTA, or (3) alternative relief, if the accused consents to such relief. Additionally, the CAAF held an accused's family could receive TC while receiving either deferred or waived forfeitures if the receipt of TC was based on a discharge and if the receipt of TC was based only on the accused receiving forfeitures, the family could receive TC if not actively receiving the deferred or waived forfeitures. Case remanded to determine if the Gov't could provide specific performance.

b. *United States v. Perron*, 58 M.J. 78 (2003). Imposing alternative relief on the appellant against his will to correct a failure of a material provision of a pretrial agreement due to a mutual misunderstanding violated the Due Process Clause because imposing remedies on an unwilling accused after the conclusion of the providence inquiry intruded upon an accused's decision to plead guilty and resulted in erroneous conclusions of voluntariness. Provision in PTA required convening authority to waive all automatic forfeitures and pay them to accused's family during his confinement. Appellant ETS'd prior to trial and entered no-pay status upon entry into confinement. Lower court determined provision was material term of PTA and remanded to either set aside plea and sentence or determine whether some other form of alternative relief was appropriate. On remand, convening authority modified sentence by approving only BCD and reduction to E-3 (original sentence, as limited by PTA, included confinement for 60 days, BCD, and reduction to E-3). Lower court set aside the reduction from E-5 to E-3. Appellant continued to argue that the relief did not give him the benefit of his bargain. Although there are circumstances when alternative relief may be appropriate, an appellate court cannot impose such relief in the absence of the appellant's consent. Here, "appellant pleaded guilty in exchange for the Government agreeing to provide his family with income while he was incarcerated. That agreement was not fulfilled in this case." Appellant has the right to choose to withdraw from the agreement. *United States v. Mitchell*, 50 M.J. 79 (1999): Impact of DoD regulation may invalidate plea. Accused's enlistment was almost over at the time of trial. After trial, he was placed in confinement. His attempt to extend his enlistment was, therefore, invalid, and he went into a no-pay status, thus mooting the PTA term limiting forfeitures. CAAF returned the case for a *Dubay* hearing; if the accused did not receive the benefit of his bargain, the pleas would be treated as improvident, and the findings set aside.

c. *United States v. Sheffield*, 60 M.J. ___ (A.F. Ct. Crim. App. 2004). Accused plead guilty to numerous military offenses and was sentenced to a BCD, four months confinement, and reduction to E-1. The accused's PTA contained a term that the CA would "waive automatic forfeitures in the amount of five hundred dollars, which sum was to be paid to the guardian appointed by the Accused to care for his minor dependants." The SJAR failed to mention this term and the CA did not pay the five hundred dollars to the accused's dependents.

On appeal the accused requested the court to disapprove his adjudged BCD, or in the alternative, to allow him to withdraw from the plea. The government contended specific performance was appropriate. AFCCA held the government could not specifically perform because the accused could not receive the benefit of his PTA bargain (for his dependents to receive five hundred dollars per month during his incarceration). Likewise, the court failed to disapprove the accused's BCD because the government did not agree to the alternative relief. The original PTA was nullified and findings and sentence set aside.

I. Policy: CA inelastic attitude? *See generally United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987) (PTAs should be negotiated on an individualized basis).

1. Appearance of fairness.

2. RCM 705 works both ways (CA may require members).

J. Unlawful command influence.

1. *United States v. Weasler*, 43 M.J. 15 (1995). While it is against public policy to require an accused to withdraw an issue of unlawful command influence in order to obtain a pretrial agreement, an accused may *initiate* a waiver of unlawful command influence in order to secure a favorable pretrial agreement. *See* Judge Wiss' concurrence in the result, warning "that this Court will witness the day when it regrets the message that the majority opinion implicitly sends to commanders."

2. *United States v. Sherman*, 51 M.J. 73 (1999). CAAF sets aside the ACCA decision and directs a *Dubay* hearing on whether there was a sub rosa agreement to waive a command influence claim.

3. *United States v. Bartley*, 47 M.J. 182 (1997). CAAF sets aside case based on finding of *sub rosa* agreement to not raise claim of command influence.

K. *Sub rosa* agreements.

1. *United States v. Sherman*, 51 M.J. 73 (1999). Accused pleaded guilty to offenses stemming from his insubordinate behavior at an off-duty dinner. After trial, accused told his appellate defense counsel that unlawful command influence had affected his pretrial confinement and his trial but was told that if the defense raised the issue they would lose the favorable pretrial agreement. TC's affidavit noted that he recalled defense raising the possibility of pretrial motions, to include an issue of command influence, but they never discussed waiving those issues as part of a pretrial agreement, and that his understanding was that even after the government agreed to the PTA, "the defense was free to raise the issues it was concerned with without fear of losing the benefits of the agreement." DC's affidavit noted that the TC had implied that he might not recommend a pretrial agreement if the UCI motions were raised, particularly since motions would require delay and the deal would be contingent to going to trial on a date certain. CAAF sets aside the ACCA decision and directed a Dubay hearing on whether there was a sub rosa agreement.

2. *United States v. Bartley*, 47 M.J. 182 (1997). Case set aside based on finding of *sub rosa* agreement to waive claim of command influence.

3. *United States v. Allen*, 39 M.J. 581 (N.M.C.M.R. 1993). Waiver of Article 32 (and the admissibility of uncharged misconduct in stipulation of fact) was undisclosed term of PTA. NMCMR expresses concern over TC and DC assurance to MJ that his inquiry covered all terms.

4. *United States v. Rhule*, 53 M.J. 647 (Army Ct. Crim. App. 2000). Accused attempted to plead guilty to several bad check offenses under Article 123a. He was also charged with larceny and forgery, to which he pleaded not guilty. After the MJ rejected the pleas as improvident, the defense announced the accused requested trial by military judge alone, and the government moved to dismiss the larceny and forgery specifications. Post-trial affidavits showed there was a sub rosa agreement for the government to dismiss the larceny and forgery offenses in exchange for the accused's election for trial by military judge alone and for proceeding to trial that day. This agreement was governed by RCM 705; it should have been in writing and disclosed at trial. Moreover, the TC should not have acted to bind convening authority. It was clear, however, that the accused's waiver of a panel was knowing, voluntary, and intelligent. There was no prejudice to the accused.

L. Post-Trial Re-Negotiation of Pre-Trial Agreement.

1. *United States v. Pilkington*, 51 M.J. 415 (1999). An accused has the right to enter into an enforceable post-trial agreement with the convening authority when the parties decide that such an agreement is mutually beneficial. Accused pleaded guilty to conspiracy to maltreat subordinates, maltreatment, false official statements, and assault. In a pretrial agreement, the convening authority agreed to suspend the bad-conduct discharge for 12 months. Accused and the convening authority agreed, in a post-trial agreement, that the latter could approve the punitive discharge as long as he "limited confinement to 90 days." On appeal, the accused argued that the post-trial agreement should be invalidated because it prevented judicial scrutiny of the terms and conditions. The court refused to invalidate the agreement, noting that the accused proposed the agreement after full consultation with counsel, stated that he voluntarily entered the agreement, and the post-trial agreement was directly related to the convening authority's obligations under the sentencing provisions of the pretrial agreement.

2. *United States v. Dawson*, 51 M.J. 411 (1999). Accused and CA agreed to a PTA in which the first 30 days of any adjudged punishment would be converted into 1.5 days' restriction. Confinement in excess of 30 days would be suspended. The accused received 100 days confinement and a BCD. She was placed on restriction, missed a muster, and was notified of pending vacation proceedings. She went AWOL, but was later apprehended and placed in confinement. Accused entered a new agreement with the CA where she agreed to waive the right to appear at a hearing to vacate the suspension of her sentence (the SJA had opined the one held in her absence was illegal), to waive any claims she might have concerning post-apprehension confinement, and to release the CA from the prior agreement. In return, the CA would withdraw the new absence charge, and provide day-for-day credit toward her time served in "pretrial confinement" (on the new charge). The SJA advised that, based on the errors that occurred in the first trial, he should disapprove all confinement. The CA approved the BCD and disapproved the confinement. The CAAF held that this was a valid post-trial agreement that did not involve post-trial renegotiation of an approved PTA. The agreement related to proceedings collateral to the original trial, and did not require the approval of a military judge.

M. Withdrawal from PTA.

1. Withdrawal by the accused.

a. RCM 705(d)(4)(A). "The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in RCM 910(h) or 811(d), respectively."

b. Accused may withdraw a plea of guilty, at the discretion of the military judge, before sentence is announced. RCM 910(h)(1).

c. *United States v. Bray*, 49 M.J. 300 (1998). A convening authority may increase the sentence cap of a pretrial agreement when an accused withdraws a guilty plea after successful completion of a providence inquiry and subsequently, in the same court-martial, later reenters pleas of guilty to the same charges. The accused withdrew his guilty plea and from the pretrial agreement, which limited confinement to 20 years to pursue the "bug spray" defense. Appellant obtained a new pretrial agreement after changing his mind. The sentence cap under the new PTA limited confinement to 30 years. Neither case law nor RCM 705 prohibit a convening authority from increasing a sentence cap in a new pretrial agreement after the convening authority properly withdraws from the original pretrial agreement. The accused chose to reopen the initial providence inquiry based on the "bug spray" defense and voluntarily withdrew from the original agreement after full consultation with counsel. The consequences of withdrawal were addressed in the original agreement, explained on the record, and the accused failed to object at trial.

2. Withdrawal by the CA.

a. RCM 705(d)(4)(B). The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement. *United States v. Pruner*, 37 M.J. 573 (A.C.M.R. 1993). Accused had not yet signed proposed stipulation of fact and had not yet requested witnesses.

b. A party may withdraw from an agreement to stipulate or from a stipulation at any time before the stipulation is accepted. RCM 811(d). After a stipulation has been accepted, a party may withdraw only if permitted to do so in the discretion of the military judge.

N. *United States v. Villareal*, 52 M.J. 27 (1999). Convening authority could lawfully withdraw from a pretrial agreement based upon pressure from the victim's family members, who were opposed to permitting the accused to plead guilty to manslaughter instead of murder. The decision to withdraw was based in part on the advice of the CA's superior. Afterward, the case was forwarded to a third, impartial CA, who convened the court, and the accused pleaded not guilty. The CAAF, by a 3-2 vote, held that the military judge did not err in refusing to order specific performance of the pretrial agreement. The accused had not relied to his detriment on the agreement in any manner that would prejudice his right to a fair trial.

V. CONCLUSION.

VI. APPENDIX – PRETRIAL PROCEDURES SUMMARY

B. MAJOR POINT	*SUMMARY*
ARTICLE 32S	Where a witnesses' testimony at trial is inconsistent with her testimony at an Article 32 hearing, her pretrial testimony may be used to impeach her (Mil. R. Evid. 613) and it may also be admissible against her as substantive evidence under Mil. R. Evid. 801(d)(1)(A).
PLEAS	Where an accused enters mixed pleas, the substance of her providency admissions may not be admitted against her during the contested trial of the offenses to which she pled not guilty. Where an accused enters mixed pleas, the members will not be informed of her guilty plea unless she has pled guilty to a lesser included offense and the government intends to contest the greater offense, or the accused requests that the panel be told of the guilty plea. RCM 913(a).
PRETRIAL AGREEMENTS	An accused's offer to "waive all motions" violates public policy. A term in a PTA offering to "waive the accused's right to speedy trial" violates public policy. The military judge should inform both parties that the provision is unenforceable and then determine whether the accused wishes to litigate the issue or waive it. Pretrial agreements may be invalidated where DOD regulations change an accused's post-trial pay status and deprive him of the benefit of his bargain. Generally, command influence issues should not be the subject of pretrial agreements. The military courts will set aside cases in which command influence issues are waived pursuant to *sub rosa* agreements.

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